DOCUMENT RESUME

ED 130 326 CS 203 040

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TITLE Newspaper Failure: An Elusive Concept.
PUB DATE 76
NOTE 25p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (59th, College Park, Maryland, July 31-August 4, 1976)

EDRS PRICE MF-$0.83 HC-$1.67 Plus Postage.
DESCRIPTORS *Federal Court Litigation; Higher Education; Legal Problems; *Legislation; *Mergers; *Newspapers; *Publishing Industry
IDENTIFIERS Antitrust Laws; *Newspaper Preservation Act

ABSTRACT

This study explores the antecedents of the Newspaper Preservation Act of 1970 (a provision which allowed for limited exemption from federal antitrust laws), including the case of "United States vs. Citizen Publishing Company" and the failing-company doctrine as enunciated in "International Shoe Company vs. Federal Trade Commission" and as applied in the Citizen Publishing case. Congress's meaning of the term "failing newspaper" is analyzed through a study of congressional records and the Bank Merger Act of 1966. Finally, the limited application and interpretation that the act has undergone since its passage are studied with the goal of locating criteria for defining newspaper failure. The study concludes that the Newspaper Preservation Act was a congressional effort to reverse the court decisions in the Citizen Publishing Case and to protect from Justice Department prosecution other newspapers engaged in joint arrangements. While the Justice Department has adopted regulations for administering the act, no guidelines to the meaning of newspaper failure have been developed. (Author/KS)

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NEWSPAPER FAILURE: AN ELUSIVE CONCEPT

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Presented to the Law Division, Association for Education in Journalism
College Park, Maryland
July 31-August 4, 1976

CS 203 040

Six years ago Congress provided certain newspaper publishers with an almost foolproof way of increasing profits and maintaining long-term economic stability. All a publisher had to do was prove his publication was failing financially and the federal government in turn would provide him with a key to financial success -- an exemption from certain antitrust laws, the right to lawfully engage in what otherwise would be considered illegal anti-competitive practices.[1]

The Newspaper Preservation Act, 15 U.S.C. Sections 1801 et. seq. (1970), which originally made its debut as the Failing Newspaper Act in 1967, was signed into law in the summer of 1970 "in the public interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States."[2] However, the act's benefits were limited to newspapers in only a few parts of the United States. Of some 1,500 United States cities having daily newspapers at the time of the act's passage, only 59 cities could lay claim to the exemptions provided by the new law. Of those 59 cities, 22 had newspapers already operating under joint newspaper operating arrangements, which the act legitimized, while the remaining 37 cities supported two or more daily newspapers which competed commercially and editorially and were, therefore, eligible for the act's antitrust exemptions. All of the remaining daily newspaper cities supported either only one newspaper or two newspapers under the same ownership.[3] It was at those 59 cities, and in particular the 22 with newspapers engaged in joint operating arrangements, that Congress aimed the Newspaper Preservation Act.

Under specified circumstances, the act legalized what would otherwise be considered <u>per se</u> violations of federal antitrust laws -- price fixing, profit pooling, and

market allocation. The act provides for two or more newspapers entering into a joint operating arrangement. Under such an arrangement, the newspapers may share common production facilities and merge their business and commercial operations, including the joint establishment of advertising and circulation rates and the joint determination of revenue distribution.[4]

The act places only three restrictions on newspapers which enter into such joint agreements. First, there must be "no merger, combination, or amalgamation of editorial or reportorial staffs" and "editorial policies must be independently determined."[5] Second, newspapers must obtain prior written consent from the U.S. attorney general before consummating such an agreement.[6] Third, no more than one of the newspapers party to the agreement may be "a publication other than a failing newspaper."[7]

While the Congressional records and reports surrounding passage of the act are replete with testimony and contentions about what constitutes a "failing newspaper," the act itself provides only a brief and broad definition. It defines a failing newspaper as "a newspaper publication, which regardless of ownership or affiliations, is in probable danger of financial failure."[8]

This study will attempt to explore what criteria have emerged for determining whether a newspaper is failing pursuant to the Congressionally provided definition. In addition, consideration will be given to how the failing newspaper definition differs from the failing company doctrine, which for 45 years has provided a standard for application of federal antitrust laws.[9] First, the circumstances which led to the passage of the act will be briefly outlined. The failing company doctrine, as originally enunciated and later applied to newspapers, will be explored. Congressional intent, as illustrated by the committee reports accompanying the act, testimony during public hearings, and floor debate, will be analyzed to determine what the act's authors intended by the term failing newspaper. Finally, judicial decisions involving the act and the Justice Department's interpretation and application of the law will be considered.

Background

In 1933, reeling from a business depression begun in the late 1920s, the Albuquerque Tribune, a Scripps-Howard publication, and the Albuquerque Journal, owned by Thomas M. Pepperday, merged the commercial and production aspects of their separate newspapers and established the oldest formal joint newspaper operating arrangement still in existence. Editorially and commercially competitive prior to the arrangement, the two Albuquerque papers found their advertising revenues declining in the early 1930s and began cutting production costs.[10] In the hope of offsetting further revenue losses, the Tribune and Journal owners agreed to establish the Albuquerque Publishing Company to handle the production and business aspects of both papers with the understanding that their editorial staffs and policies would remain independent.[11] The two newspapers moved into the same building to share production facilities and the Albuquerque Publishing Company began selling advertising for the two papers, either separately or at an optional combination rate; handling circulation and distribution; and distributing its earnings back to the two parent companies.[12] On May 15, 1954, an editorial in Editor and Publisher took note of the "noble experiment" begun in Albuquerque 21 years earlier and stated, "They didn't know it then, but they started a cost-saving innovation that has proved to be eminently successful wherever it has been tried. It is no longer an experiment."[13]

Joint operating arrangements cropped up across the country as newspapers discovered the profitability of eliminating commercial competition and sharing the burden of very costly production equipment. By the time the editorial appeared in Editor and Publisher, the number of joint arrangements had reached 13 and by the time Congress began considering the Newspaper Preservation Act, 22 cities, from Miami, Fla., to Honolulu, Hawaii, had newspapers engaged in such commercial mergers.[14] For 30 years the U.S. Justice Department apparently took little notice of these semi-mergers. Parties to some of the joint arrangements reported that the Justice Department had even provided "release letters" when notified of plans to institute such agreements.[15]

In 1965 the Antitrust Division of the Justice Department dramatically took notice of one such joint arrangement. The department brought suit against the Citizen Publishing Company, owner of the Tucson Daily Citizen; the Star Publishing Company, owner of the Arizona Daily Star; Tucson Newspapers, Inc., the corporation set up by the Star and Citizen to handle the business and production aspects of both papers; the Arden Publishing Company, established by the Citizen stockholders for the purpose of purchasing the Star; and William A. Small, Sr., the sole stockholder of Arden. The antitrust action brought in Tucson Federal District Court -- United States v. Citizen Publishing Co.[16] -- was a two-pronged attack. The Star and Citizen had just concluded a total merger, with the Arden Co. purchasing the Star for $9,999,790 when the government suit was instigated.[17] The government sought to enjoin the purchase as a violation of Section 7 of the Clayton Act.[18] Far more significant for the newspaper industry as a whole, and in particular for the 42 other dailies engaged in joint arrangements, however, was that part of the Justice Department suit which charged that the joint agreement between the Star and Citizen, in operation since 1940, violated Sections 1 and 2 of the Sherman Act.[19]

The courts agreed with the Justice Department. U.S. District Judge James A. Walsh and later the U.S. Supreme Court[20] found that the Tucson agreement called for price fixing, profit pooling, and market allocation, all per se violations of the Sherman Act. The Citizen's purchase of the Star also was found to violate the Clayton Act. According to the courts, the two papers were allowed to continue a joint arrangement, but one without the following provisions:

1. joint setting of advertising and subscription rates (price fixing);
2. pooling and then distributing profits to the two parent companies (profit pooling);
3. agreeing that neither of the two parties would engage in any other business in the Tucson metropolitan area which might conflict with the agreement (market allocation).[21]

The court decisions mobilized the newspaper industry and soon Congress was besieged with cries for relief. The Supreme Court had relied heavily on the so-called

failing company doctrine in its findings against the Tucson papers. Publishers, their attorneys, and supportive Congressmen argued that the courts did not understand the unique economics of the daily newspaper industry. They contended that the failing company standard might well apply to shoe companies, but it was way too stringent for the newspaper publishing industry. A different, less strict standard was needed to determine when newspapers were financially failing and in need of price fixing, profit pooling, and market allocation arrangements to continue in existence.[22]

The Failing Company Defense

The failing company doctrine played a significant role in the Supreme Court's decision that the Tucson operating arrangement violated federal antitrust laws. "The only real defense of appellants," wrote Mr. Justice William O. Douglas in the court's majority opinion, "was the failing company defense -- a judicially created doctrine ....A consideration of it makes it plain that the requirements of the failing company doctrine were not met."[23]

The failing company doctrine, first enunciated by the Supreme Court in 1930, was accepted by the court as a defense in International Shoe Company v. Federal Trade Commission,[24] a case involving Section 7 of the Clayton Act which outlaws mergers of a monopolistic or anti-competitive nature. Essentially, the doctrine states that a merger or other form of combination of competing companies is not anti-competitive per se if one of the companies involved is a failing company. The logic behind the doctrine is that if a company fails it will be lost as a competitive element in the marketplace anyway. Therefore, combination with a failing company cannot be anti-competitive per se.

In International Shoe, the court laid down two basic criteria for ascertaining whether a company was indeed failing. The McElwain Shoe Co., wrote Mr. Justice George Sutherland in the majority opinion, was "a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure with resulting loss to its stockholders and injury

to the communities where its plants operated....'[25] In the second place, Justice Sutherland wrote that "there being no other prospective purchaser," acquisition by a competitor was not in and of itself anti-competitive or a restraint on commerce.[26]

To facilitate an understanding of what the court meant by "resources so depleted and the prospect of rehabilitation so remote" that a "grave probability of business failure" was imminent, some facts from the International Shoe case are useful. The court noted that during 1920 the McElwain Co.'s losses amounted to over $6,000,000. A company surplus in May, 1920, of about $4,000,000 within a year had been turned into a deficit of $4,382,136.70. By the spring of 1921, the company owed about $15,000,000 to 60 or 70 banks and trust companies and owed nearly $2,000,000 on current accounts. The McElwain factories, which had a production capacity of 38,000 to 40,000 pair of shoes daily, were producing 6,000 to 7,000 per day in 1921.[27] In the majority opinion, Justice Sutherland summed up the financial situation of the McElwain Co. as follows:

> "(T)he financial condition of the company became such that its officers, after long and careful consideration of the situation, concluded that the company was faced with financial ruin and that the only alternatives presented were liquidation through a receiver or an outright sale. An examination of its balance sheets and statements and testimony of its officers and others conversant with the situation clearly show that the company had reached the point where it could no longer pay its debts as they became due. In the face of those adverse circumstances it became necessary under the laws of Massachusetts to make its annual financial statement, which, when filed, would disclose a condition of insolvency, as that term is defined by the statute and decisions of the state...and thus bring the company to the point of involuntary liquidation."[28]

Based upon the above set of financial data, the Supreme Court declared the McElwain Co. a failing company. Furthermore, the court decided that its prosperous competitor, the International Shoe Co., was the only available purchaser and that the acquisition of McElwain by International Shoe was "not with a purpose to lessen competition, but to facilitate the accumulated business of the purchaser."[29] The criteria of the failing company doctrine being met, the Supreme Court permitted

the two companies to merge while at the same time establishing a significant part of antitrust law.

The Tucson Case

Although the failing company standard was originally enunciated as a defense in a case involving Section 7 of the Clayton Act dealing with mergers, the court showed its willingness to extend that potential defense to alleged Sherman Act violations in the Citizen Publishing Co. case. Besides the "grave probability of a business failure" and "no other prospective purchaser" tests, however, Justice Douglas writing for the majority added a third criterion to the failing company defense. Citizen Publishing Co., he wrote, did not show that reorganization through receivership or under the federal Bankruptcy Act was a "dim or nonexistent" prospect.[30] The court's opinion stated:

> "Moreover, we know from the broad experience of the business community since 1930, the year the International Shoe case was decided, that companies reorganized through receivership or through Chapter 10 or Chapter 11 of the Bankruptcy Act often emerged as strong competitive companies. The prospects of reorganization of the Citizen in 1940 would have to be dim or nonexistent to make the failing company doctrine applicable in this case."[31]

Again a look at the financial data made public during the Citizen Publishing case may throw some light on what the court meant by a failing company and what Congress later meant by a failing newspaper. From 1932 until 1940, the year the joint operating agreement was instituted between the Citizen and Star, Citizen Publishing Co. operated at a "substantial loss" defrayed by contributions from its stockholders, Federal District Court Judge James A. Walsh found.[32] Meanwhile, the Star operated at a profit.[33] The Star's annual profits averaged about $25,825, while the Citizen's losses averaged about $23,550 annually.[34] By 1940, the Citizen had debts of more that $109,000 of which about $79,000 was owed to stockholders who had not received dividends for several years.[35] (Compare the $109,000 in debts for the Citizen to the approximately $17,000,000 in debts for the McElwain Shoe Co.) The circulation of the Star and Citizen were approximately equal, but the Star had 50 per cent more

advertising than the Citizen.[36] On the basis of these and other financial data, both Judge Walsh and the Supreme Court determined that the Citizen was not on the brink of a financial failure in 1940 when it entered into a commercial merger with its competitor.

Congressional Intent

The Newspaper Preservation Act was a knee-jerk response by Congress to the Citizen Publishing Co. case. It is, therefore, reasonable to assume that the facts involved in the Tucson case, as well as those circumstances leading up to the establishment of the 21 other joint arrangements, played a major role in influencing Congress in its definition of a failing newspaper.[37]

Congressional debate on the act,[38] Senate and House committee reports accompanying the bills,[39] plus the reams of testimony before Congressional committees[40] make it very clear what Congress did not mean by a failing newspaper. A major goal of the act was to eliminate the judicially created failing company tests in cases involving joint newspaper operating arrangements. According to the report accompanying the bill out of the House Judiciary Committee:

> "The definition of the term 'failing newspaper' is a departure from the 'failing company' doctrine that has been enunciated by the Supreme Court in the Tucson case and the cases there cited."[41]

The Senate Judiciary Committee report also attempted to illustrate what Congress did not mean by a failing newspaper.

> "The definition of 'failing newspaper' broadens the definition of failing business supplied by the Supreme Court in International Shoe v. Federal Trade Commission....It is the committee's view that the reasoning of the court is sound, but that the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses, that when a newspaper is failing it is harder to reverse the process and it is almost impossible to find an outside buyer. The committee wishes to establish a less stringent test than that applied in the case of Citizen Publishing Co. v. United States."[42]

While Congress made it clear it was repudiating the three court-stated criteria for determining business failure when it came to newspaper operating arrangement, the lawmakers provided only one, rather vaguely-stated, criterion for judging

newspaper failure -- "in probable danger of financial failure."[43] Congressional records, however, do provide some clues for interpretation and application of the definition. In the first place, it is clear that Congress did not intend that the same definition be applied to existing joint operating arrangements and new arrangements entered into after the effective date of the act. In the grandfather provisions of the act, all joint operating arrangements entered into prior to passage of the law are exempted from certain antitrust laws "if at the time at which such arrangement was first entered into, regardless of ownership or affiliation, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication."[44] It is clear that the definition to be applied to existing joint arrangements was intended to be less stringent than not only the failing company doctrine, but also than the "probable danger of financial failure" definition to be used on applications for new agreements.[45] The key word is "remain" for it implies that even a financially sound publication could qualify for the antitrust exemption if there existed the likelihood that it could in the future become financially unsound. Furthermore, it has been suggested that the term "financially sound" is even more elusory than "probable danger of financial failure." Thomas E. Harris, associate general counsel of the AFL-CIO, testifying before the Senate Judiciary Committee's Subcommittee on Antitrust and Monopoly, stated:

> "Again, it is not clear what is meant by 'financially sound.' It might mean operating in the black, or, as the term is sometimes used in financial circles, it could mean producing a rate of return needed to attract or hold capital."[46]

The House Judiciary Committee report accompanying the Newspaper Preservation Act also stressed the differing standards:

> "The test for financial stability in Section 4(a) (that section of the House version of the Act referring to existing joint arrangements) differs from the 'failing company' doctrine enunciated by the Supreme Court in the Tucson case and differs from the term 'failing newspaper' as defined in Section 3 of the Act (that section referring to future joint agreements) by establishing a less strict standard. This distinction is made in order to make it clear that all joint newspaper operating arrangements entered into prior to the effective date of this Act are intended to be within the scope of the antitrust exemptions if there is compliance with the standard."[47] (Emphasis added.)

The record, therefore, clearly indicates that the failing newspaper definition was intended to fall somewhere between the stringent criteria for a failing company and the catchall, flexible standard established to encompass all existing joint arrangements.

When it came to specifying the standard to be used for future joint operating arrangements, Congress chose to borrow from existing federal law. The phrase "probable danger of financial failure" was taken from the Bank Merger Act of 1966,[48] according to the Congressional records surrounding the passage of the Newspaper Preservation Act.[49] Illinois Republican Sen. Everett Dirksen explained:

> "In the Bank Merger Act of 1966, Congress recognized a public interest in broadening the 'failing company' doctrine as applied to banks. There, Congress stated that a bank might merge with a competitor in order to prevent a probable failure. The amending language 'in danger of probable failure' is basically from the text of the Bank Merger Act."[50]

During the Senate debate on the act, Michigan Democrat Philip Hart stated, "A court would be able to apply as precedent decisions under the Bank Merger Act which uses similar language."[51]

In granting approval of bank mergers, the Bank Merger Act provides that the government "shall take into consideration the financial and managerial resources and future prospects of the existing and proposed institutions and the conveniences and needs of the community to be served."[52] In 1968, the Supreme Court provided an interpretation of the Bank Merger Act in the case of the United States v. Third National Bank in Nashville. A look at that decision provides some insights into Congress' concept of a failing newspaper. In his opinion for the majority, Mr. Justice Byron White wrote:

> "Congress was also concerned about banks in danger of collapse -- banks not so deeply in trouble as to call forth the traditional 'failing company' defense, but nonetheless in danger of becoming before long financially unsound institutions. Congress seems to have felt that a bank failure is a much greater community catastrophe than the failure of an industrial or retail enterprise and that a much smaller risk of failure than that required by the failing company doctrine should be sufficient to justify the rather radical preventive step of an anti-competitive merger."[54]

In the Third National Bank case, however, the court found that the Nashville Bank and Trust Co., the allegedly failing institution involved in the case, did not meet

even the less stringent failing test of the Bank Merger Act. In 1962, Nashville Bank and Trust's rating slipped from "satisfactory" to "fair" largely because of a higher than usual percentage of unsound loans. It's share of the total Nashville banking business declined from a high of 5.72 per cent on June 30, 1960, to 4.83 per cent on June 30, 1964. Before 1960, Nashville Bank and Trust grew faster than the average growth rate for other Nashville banks, while after 1960 its growth rate slipped below the average for its competitors.[55] The federal district court, which had upheld the merger, called Nashville Bank and Trust "a stagnant and floundering bank."[56] However, the Supreme Court in reversing the lower court decision noted that the bank had assets of $50,900,000 and deposits of $45,500,000. The institution showed steady profitability, including after tax earnings of $368,000 in 1963.[57]

The district court and Supreme Court both found that Nashville Bank and Trust's problems were essentially due to poor management. The district court, however, found that the bank's good earnings record would have been damaged by "the expenditures which needed to be made for the proper maintenance of the bank" unless a merger took place.[58] The Supreme Court disagreed saying that poor management was not a sufficient reason to judge a bank failing and eligible for what would otherwise be considered an anti-competitive merger. "The test does not demand the impossible or the unreasonable. It merely insists that before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot be reasonably expected through other means," wrote Justice White.[59]

Since Congress was using the Bank Merger Act of 1966 as a guideline in developing the failing newspaper definition, the Third National Bank case then provides at least two criteria for determining what Congress meant by "probable danger of financial failure." First, poor or ineffectual management alone is not sufficient reason to judge an institution financially failing. Second, the companies must show "that the gain expected from the merger cannot be reasonably expected through other means."

Besides references to the Bank Merger Act and judicial decisions on failing businesses, the Congressional record also provides some direct references to criteria

to be used in judging failure. The Senate Judiciary Committee report accompanying the act stated that in determining financial soundness

> "...the court may consider the operating results of the newspaper and other relevant facts, such as returns on invested capital, cost and income trends, circulation trends, advertising-news ratios and trends, competitive factors in the relevant market area, availability of personnel, availability of capital from shareholders, investments in fixed assets, population of the relevant market area, the population trends, and all other relevant economic evidence."[60]

During the Senate floor debate on the act, Utah Sen. Wallace Bennett provided the following list of factors to be considered in determining financial failure:

> "First, net loss or declining income;
> Second, whether accounting ratios show instability, including net income as a percentage of invested capital, net income as a percentage of gross revenue, gross revenue as a percentage of invested capital, current assets to current liabilities, long term indebtedness, and so forth;
> Third, declining circulation trends;
> Fourth, increasing cost trends, including operational costs, circulation and subscription costs, and solicitation costs;
> Fifth, increasing advertising rates without corresponding increases in income;
> Sixth, declining trends in the percentage of newspaper columns used for advertising purposes;
> Seventh, factors, showing strengthening of a competitor including his increased advertising and circulation trends;
> Eighth, price war conditions, promotional activities and premiums used as a means to maintain circulation and advertising, demonstrating inherent instability;
> Ninth, instability and insecurity of personnel;
> Tenth, the extent of investments required in fixed assets, equipment, and machinery;
> Eleventh, demands on capital apart from newspaper operations;
> Twelfth, adverse legal developments;
> Thirteenth, basic instability shown by the necessity of reliance upon the financial strength of stockholders or the financial capacity and operations of parent companies or other related newspaper publications rather than on the inherent strength of the paper itself."[61]

Sen. Bennett's thirteenth criterion points to a very significant portion of the failing newspaper definition. The act states that a failing newspaper is one which "regardless of its ownership or affiliations, is in probable danger of financial failure."[62] (Emphasis added.) While Congress may have been somewhat vague as to the meaning of a failing newspaper, the record makes it eminently clear that a parent company's assets or the financial success of a newspaper owner's other holdings, whether they be other media or unrelated enterprises are not to be considered in judging the financial condition of the allegedly failing publication.[63] Nebraska

Republican Sen. Roman Hruska emphasized that point for his Senate colleagues:

> "The question of whether a paper is failing should be based upon the financial operation of that paper, and not upon the presence or absence of financial support from other newspaper business activities in other cities or from other financial activities of the owners of the failing newspaper. If we were to eliminate the language suggested (regardless of its ownership or affiliations) then a reviewing court could find that so long as the owners of a paper had other resources, they would have to continue to invest all other funds in the failing paper until there was nothing left to invest. Thus, the test would not be whether the newspaper was failing, but whether the owners of the newspaper were themselves failing."[64]

A final note on the financial circumstances of newspapers already engaged in joint arrangements at the time of the act's passage is needed before applying the failing newspaper definition. It is clear that Congress had the 44 jointly operating newspapers in mind during the deliberation and passage of the act. Financial data from the two Tucson papers has been provided. While the House and Senate Judiciary Committees had at their disposal financial information from all 44 newspapers, agreements were made with the publishers to keep such information secret. The publisher of the Honolulu Advertiser, Thurston Twigg-Smith, one of the most vocal and active supporters of the act, publicly provided some information about his paper's financial situation prior to its entering into a joint arrangement with the Honolulu Star-Bulletin in 1962, however.[65] Twigg-Smith reported that during three of the five calendar years preceding the joint arrangement, the Advertiser operated at a loss. In 1957, the loss amounted to over $47,500; in 1958 a profit of almost $192,000 was realized; in 1959 profits totaled almost $57,000; and in 1960 and 1961 losses were about $110,600 and $72,400 respectively. The 1958 profit, Twigg-Smith testified, was due to "the drastic cutback in expenditures instituted...in view of the loss suffered in 1957" and the 1959 profit resulted largely from a special statehood edition which netted $56,171. The heavy losses sustained in 1960 and 1961 were due to a promotional campaign and reductions in the advertising rates designed to bolster the Advertiser's portion of both the advertising and circulation markets, Twigg-Smith said. The Star-Bulletin had gained advertising at four times the rate of the Advertiser between 1950 and 1958 and by 1958 the

Advertiser claimed only 37 per cent of all advertising appearing in both papers and 32 per cent of the total circulation of both papers.[66] Furthermore, the Advertiser's printing and production equipment was antiquated and in need of replacement at an estimated cost of $1,458,000, while labor union demands and pension payments were straining the paper's budget, the publisher contended.[67] The Advertiser had not paid dividends for two years; short term bank loans totaled some $200,000; requests for long-term financing had been turned down; and by late 1961 losses were running about $25,000 a month, Twigg-Smith concluded.[68]

Five Years of Experience with the Act

Regardless of legislative intent, a law takes on its true meaning as it is enforced, applied and interpreted over time. Thus far, the Newspaper Preservation Act has been subject to only very limited application and interpretation.

The act requires the U.S. attorney general to provide written approval before any new joint operating arrangements can be consummated.[69] In conjunction with this responsibility, the Justice Department has adopted rules for the application of the act.[70] The regulations establish a procedure for applying for a joint operating arrangement;[71] require the filing of financial and operating records;[72] provide for public notice,[73] intervention by interested parties,[74] and, if necessary, public hearings.[75] In addition, the regulations permit the attorney general to keep the financial records of the newspapers confidential upon the request of the parties involved.[75]

The rules, however, do not provide a definition or interpretation of what constitutes a failing newspaper. In a letter dated Oct. 29, 1975, John W. Poole, acting chief of the Litigation Section of the department's Antitrust Division, stated:

> "The regulations do not contain a definition or guidelines relating to the term 'failing newspaper,' nor does the Department have any formal guidelines by which it determines whether a newspaper is 'failing' within the meaning of the Act."[77]

One of the main responsibilities of the attorney general, though, is to "determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper."[78] Despite the absence of any formal

guidelines for making such a determination, former Attorney General William Saxbe appears to have done just that when on Nov. 25, 1974 he approved an application from the Anchorage Times and Anchorage News to enter into a joint operating arrangement.

In recommending approval of the Anchorage joint arrangement, the Antitrust Division acknowledged the absence of any clear-cut criteria for judging financial failure.[79] Drawing upon Congressional records, however, a report prepared by the Antitrust Division contended that Congress had established two parameters for determining probable danger of financial failure.

> "First, the test is a more stringent one than the test the Act applies to arrangements already in effect when the Act was passed....On the other hand, Congress intended the 'probable danger of financial failure' test to be a 'departure' from the usual antitrust 'failing company' defense....The legislative history, then, does not offer precise or quantitative guidelines as to what constitutes 'probable danger of financial failure'. But with this background we think that a newspaper with a long term history of financial and operating difficulties with profitable operations so remote that the newspaper will, in all likelihood, cease publication, may reasonably be said to be in probable danger of financial failure."[80]

The Antitrust Division lawyers and Attorney General Saxbe agreed that the Anchorage News fell within the parameters intended by Congress. The News had operated at a loss from 1968 through the first six months of 1974, according to an Antitrust Division report.[81] During that period, the News had revenues of $7,148,000 and losses of $3,492,000.[82] "These losses...are real, not bookkeeping, losses with non-cash expenses (depreciation and amortization) amounting to only about $40,000 annually," the Antitrust Division reported.[83] The newspaper was reportedly kept in operation by a $2,955,000 contribution from its owners, the Northern Publishing Co., Inc., and Alaska Communications Corporation, both of which were owned by the Katherine Fanning family.[84] The News had a daily circulation of 15,079 and a Sunday circulation of 22,814, while the evening Times, published by Robert B. Atwood, had a circulation of 41,069 in 1974.[85] As in the Honolulu situation, the News was reportedly operating with antiquated equipment and suffering advertising volume losses.[86] The Antitrust Division concluded that to break even the News would have to sell nearly twice as much advertising per year as it was selling immediately before the joint arrangement.[87]

The Anchorage case provides the only example of the Newspaper Preservation Act in operation since so far the two Alaska papers have been the only ones to apply to the attorney general for approval of a joint operating arrangement.[88]

Meanwhile, the courts have been called upon in three instances to provide some interpretation of the Newspaper Preservation Act.[89] In none of the three cases was the definition of a failing newspaper at issue, however. In American's Best Cinema Corporation v. Fort Wayne Newspapers, Inc., the issue was that portion of the act which provides that joint operating newspapers are not exempt from antitrust laws governing predatory practices.[90] The case of Newspaper Guild v. William B. Saxbe, Attorney General, involved a challenge from the Guild to a portion of the Justice Department's Newspaper Preservation Act regulations.[91] In Bay Guardian Company v. Chronicle Publishing Company, the publishers of the Guardian challenged the constitutionality of the Newspaper Preservation Act under the First Amendment.[92] U.S. District Judge Oliver J. Carter dismissed the constitutionality challenge and refused to address the question of whether the San Francisco Chronicle or San Francisco Examiner was a failing newspaper at the time the two papers entered a joint arrangement in 1965. He did, however, make what appears to be at this time the only judicial statement regarding the definition of a failing newspaper.

> "The simple answer to the plaintiffs' contention is that the Act does not authorize any conduct. It is a narrow exemption to the antitrust laws for newspapers in danger of failing. Thus, it is in many respects merely a codification of the judicially created 'failing company' doctrine."[92] (Emphasis added.)

In light of the efforts Congress made to emphasize its repudiation of the failing company defense when it came to joint newspaper operating arrangements, Judge Carter's opinion is somewhat surprising.

Conclusion

Time and experience have not yet provided a sufficient basis for arriving at definitive conclusions as to what constitutes a failing newspaper under the Newspaper Preservation Act. As yet, neither the courts nor the attorney general, in whose hands application

and interpretation of the act now rest have provided convenient criteria such as the Supreme Court provided for defining a failing company in the International Shoe and Citizen Publishing Co. cases.

Congress' intentions in passing the act are quite clear, however. Congress did not intend for a newspaper to have "resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure" before it would be permitted to enter a joint operating agreement. Nor did it intend that a newspaper have "no other prospective purchaser" and face "dim and nonexistent" prospects of reorganization under the Bankruptcy Act before being granted limited antitrust exemptions under the act. What Congress seemed to intend was that the courts and attorney general look towards the less stringent test of financial failure provided in the Bank Merger Act of 1966 and the subsequent Third National Bank in Nashville case. Congress appeared to be viewing newspapers as quasi-public entities whose continued existence and economic health are much more significant to the public interest than the continued existence of an individual shoe or widget manufacturer. Congress' message to the courts was clear: Handle newspapers with a degree of gentleness. They are economically more fragile than other types of industrial concerns and significantly more vital to the nation's well being.

Whether the courts or the attorney general got that message is not yet clear. In the only case the attorney general has been called upon to handle thus far, former Attorney General Saxbe appears to have been faced with a rather clear-cut case of impending financial failure. Losses at the rate of $25,000 per month as experienced by the Anchorage News did not come close to meeting the McElwain Co.'s reported loss of $6,000,000 in one year alone in the International Shoe case. Nonetheless, the financial, circulation, and advertising data available from the Anchorage report do point to an obvious financial instability on the part of the News. What remains to be seen is how the Justice Department will react to a situation in which financial insecurity is less blatant.

The sole judicial response to the definition of a failing newspaper is surprising in that it flies directly in the face of Congress' intent in passing the Newspaper Preservation Act. Judge Carter's portrayal of the act as "in many respects merely a codification of the judicially created 'failing company' doctrine" was, however, little more than an aside in the Bay Guardian case. As such, it seems unlikely that his interpretation would become significant legal precedent.

Still needed before the definition of a failing newspaper becomes a meaningful and workable tool are some clear, universally-applicable criteria for determining financial failure within the newspaper industry. The judiciary appears the most likely source of such criteria, but the very structure of the Newspaper Preservation Act provides the major obstacle to judicial development of such criteria. It is the Justice Department, not the wronged competitors or victimized consumers, which has been in the forefront in bringing antitrust problems, questions, and violations to the courts' attention. Yet, the act places the Justice Department in the role of administrator of the law, a role that is hardly consistent with the role of prosecutor of violators of the act. It is unlikely that the attorney general could sanction a joint newspaper operating arrangement and then turn around and challenge his own approval on the basis that the newspaper was not, in fact, failing.

The main hope, then, for the emergence of precise criteria for defining a failing newspaper lies in the possibility of a newspaper filing a court challenge to a Justice Department denial of a joint agreement application. It is a process which is not expressly provided for in the act, but which is nevertheless an available route. Until such time as either the attorney general sees fit to promulgate specific guidelines relating to newspaper failure or the courts are called upon to devise criteria for determining failure, there remains little more than millions upon millions of Congressional words to determine when a publication is "in probable danger of financial failure."

Notes

[1]For references to the profitability of newspapers engaged in joint operating arrangements see U.S. Congress, Senate, 91st Cong., 2d Sess., Jan. 29, 1970, Congressional Record 116, pt. 2, p. 1790, statement of Sen. Fong; pp. 1803-1807, balance sheets, statements of income and statements of retained earnings for Lincoln (Neb.) Journal-Star Printing Co. and Madison (Wis.) Newspapers, Inc.; and p. 1815, statement of Sen. McIntyre; U.S. Congress, Senate, Committee on the Judiciary, The Failing Newspaper Act, Hearings before the Subcommittee on Antitrust and Monopoly on S. 1312, 90th Cong., 1st sess., 1967, pt. 2, pp. 611-625, statement of Thurston Twigg-Smith, publisher of the Honolulu Advertiser; U.S. Congress, Senate, Committee on the Judiciary, The Newspaper Preservation Act, Hearings before the Subcommittee on Antitrust and Monopoly on S. 1520, 91st Cong., 1st sess., 1969, pp. 176-181, speech by Dr. Bryce Rucker, Southern Illinois University; and pp. 223-237, Arizona Daily Star presentation for relief from wartime excess profits tax.

[2]Newspaper Preservation Act, 15 U.S.C. Sec. 1801, Congressional Declaration of Policy.

[3]U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 29, 1970, Congressional Record 116, pt. 2, p. 1786, statement of Sen. Inouye.

[4]Newspaper Preservation Act, 15 U.S.C. Sec. 1802(2).

[5]Ibid.

[6]Ibid., Sec. 1803(b)

[7]Ibid.

[8]Ibid., Sec. 1802(5).

[9]International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 74 L. Ed. 431, 50 S. Ct. 89 (1930).

[10]Editor and Publisher, Feb. 25, 1933, p. 72.

[11]Ibid.

[12]Ibid.

[13]Editor and Publisher, May 15, 1954, p. 42.

[14]U.S. Congress, House, Newspaper Preservation Act, House Report 91-1193, to accompany H.R. 279, 91st Cong., 2d sess., 1970, p. 5. (Hereafter, House Report.)

[15]U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 29, 1970, and Jan. 30, 1970, Congressional Record 116, pt. 2, pp. 1783, 2005-2006, statement of Sen. Hruska; also U.S. Congress, Senate, Committee on the Judiciary, The Newspaper Preservation Act, Hearings before the Subcommittee on Antitrust and Monopoly on S. 1520, 91st Cong., 1st sess., 1969, p. 314, statement of Morris J. Levin, counsel for Tucson Newspapers, Inc., (Hereafter, Senate Hearings, 1969.)

[16]United States v. Citizen Publishing Co., 280 F. Supp. 978, (D. Ariz. 1968). (Hereafter, U.S. v. Citizen.)

[17]Ibid., at 979, Finding of Fact No. 6.

[18]Section 7 of the Clayton Act, 15 U.S.C., provides in part: "...no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital...of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

[19]Section 1 of the Sherman Act, 15 U.S.C., provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, or commerce among the several States, or with foreign nations, is declared to be illegal." Section 2 provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be guilty of a misdemeanor."

[20]Citizen Publishing Co. v. United States, 393 U.S. 131, 89 S. Ct. 927, 22 L. Ed. 148 (1969). (Hereafter, Citizen v. U.S.)

[21]U.S. v. Citizen, at 994, Judgement and Decree Nos. 4 and 5, aff'd. in Citizen v. U.S.

[22]U.S. Congress, House, Committee on the Judiciary, The Newspapers Preservation Act, Hearings before the Subcommittee on Antitrust on H.R. 279, 91st Cong., 1st sess., 1969, p. 12, statement of Mr. Edmondsen. (Hereafter, House Hearings, 1969.) Also, U.S. Congress, House, 91st Cong., 2d sess., July 8, 1970, Congressional Record 116, pt. 17, p. 23166, statements of Mr. Halpern and Mr. Adair; U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 29, 1970, Congressional Record, 116, pt. 2, pp. 1785-1786, statements of Sen. Inouye and Sen. Bennett.

[23]Citizen v. U.S., at 136.

[24]International Shoe Co. v. Federal Trade Commission, 280 U.S. 291, 50 S. Ct. 89, 74 L. Ed. 431 (1930). (Hereafter, International Shoe v. F.T.C.)

[25]Ibid., at 302.

[26]Ibid., at 302.

[27]Ibid., at 300.

[28]Ibid., at 300.

[29]Ibid., at 302.

[30]Citizen v. U.S., at 138.

[31]Ibid., at 138-139.

[32]U.S. v. Citizen, at 980, Finding of Fact No. 12.

[33]Ibid.

[34]Citizen v. U.S., at 133.

[35]U.S. v. Citizen, at 980, Finding of Fact No. 15.

[36]Ibid., at 980, Finding of Fact No. 13.

[37]This becomes an even more warranted assumption when one looks at the main sponsors of the failing newspaper legislation. Sen. Carl Hayden (D-Ariz.) introduced the original Failing Newspaper Act, S. 1312, in 1967. Sen. Daniel Inouye (D-Hawaii) was the main sponsor of S. 1520 which after amendments became the Newspaper Preservation Act, while in the House Mr. Spark M. Matsunga, also of Hawaii, was one of the main authors of H.R. 279, a bill virtually identical to the Senate version. Honolulu was one of the cities with a joint operating arrangement in effect.

[38]Senate debate can be found in U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 29-30, 1970, Congressional Record 116, pt. 2, pp. 1783-2018; House debate can be found in U.S. Congress, House, 91st Cong., 2d sess., July 8, 1970, Congressional Record 116, pt. 17, pp. 23141-23180.

[39]U.S. Congress, Senate, Newspaper Preservation Act, Senate Report 91-535 to accompany S. 1520, 91st Cong., 2d sess., 1969. (Hereafter, Senate Report.) Also, House Report.) Also, House Report (see Note 14.)

[40]Senate Hearings, 1969; House Hearings, 1969; U.S. Congress, Senate, Committee on the Judiciary, The Failing Newspaper Act, Hearings before the Subcommittee on Antitrust and Monopoly on S. 1312, 90th Cong., 1st sess., 1967. (Hereafter, Senate Hearings, 1967.)

[41]House Report, p. 10.

[42]Senate Report, p. 4.

[43]Newspaper Preservation Act, 15 U.S.C. Sec. 1802(5).

[44]Ibid., Sec. 1803(a).

[45]House Report, p. 10; U.S. Congress, House, 91st Cong., 2d sess., July 8, 1970, Congressional Record 116, pt. 17, p. 23155, remarks of Mr. Railsback.

[46]Senate Hearings, 1969, p. 292.

[47]House Report, p. 10.

[48]Bank Merger Act of 1966, 12 U.S.C. Sec. 1828(c).

[49]Senate Hearings, 1969, pp. 7-8, statement of Sen. Dirksen; U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 30, 1970, Congressional Record 116, pt. 2, p. 2004, remarks of Sen. Hart; U.S. Congress, House, 91st Cong., 2d sess., July 8, 1970, Congressional Record 116, pt. 17, p. 23146, remarks of Mr. Kastenmeier.

[50]Senate Hearings, 1969, pp. 7-8.

[51]U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 30, 1970, Congressional Record 116, pt. 2, p. 2004, statement of Sen. Hart.

[52]Bank Merger Act of 1966, 12 U.S.C. Sec. 1828(c) (5) (B).

[53]United States v. Third National Bank in Nashville, 390 U.S. 171, 88 S. Ct. 882, 19 L. Ed. 2d 1015 (1967). (Hereafter, U.S. v. Third National Bank.)

[54]Ibid., at 187.

[55]Ibid., at 175 and 187.

[56]United States v. Third National Bank in Nashville, 260 F. Supp. 869 (D.C.M.D. Tenn. 1966), Finding of Fact No. 134. (Hereafter, U.S. v. Third National Bank, D.C.M.D. Tenn.)

[57]U.S. v. Third National Bank, at 176 and 187.

[58]U.S. v. Third National Bank, D.C.M.D. Tenn., Finding of Fact No. 181.

[59]U.S. v. Third National Bank, at 190.

[60]Senate Report, p. 5.

[61]U.S. Congress, Senate, 91st Cong. 2d sess., Jan. 29, 1970, Congressional Record 116, pt. 2, p. 1787, remarks of Sen. Bennett.

[62]Newspaper Preservation Act, 15 U.S.C. Sec. 1802(5).

[63]Senate Report, p. 5; U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 30, 1970, Congressional Record 116, pt. 2, p. 2006, remarks of Sen. Hruska; U.S. Congress, House, 91st Cong., 2d sess., July 8, 1970, Congressional Record 116, pt. 17, p. 23147, remarks of Mr. Eckhardt and Mr. Kastenmeier.

[64]U.S. Congress, Senate, 91st Cong., 2d sess., Jan. 30, 1970, Congressional Record 116, pt. 2, p. 1787, remarks of Sen. Hruska.

[65]In addition, financial data were available for those joint operating newspapers which were controlled by publicly-owned, stock-issuing corporations. The corporate financial reports, however, do not provide as clear, concise and easily comparable financial information as did the courts in the Tucson case and Mr. Twigg-Smith in his testimony.

[66]Senate Hearings, 1967, pt. 2, p. 614.

[67]Ibid., p. 615.

[68]Ibid., p. 616.

[69]Newspaper Preservation Act, 15 U.S.C. Sec. 1803(b).

[70]Newspaper Preservation Act Regulations, Title 28, Code of Federal Regulations, Pt. 48, Judicial Administration, Federal Register 39, No. 1, Jan. 2, 1974, pp. 7-10. (Hereafter, NPA Regulations.)

[71]Ibid., Sec. 48.3.

[72]Ibid., Sec. 48.4.

[73]Ibid., Sec. 48.6.

[74]Ibid., Sec. 48.8 and 48.11.

[75]Ibid., Sec. 48.8 and 48.10

[76]Ibid., Sec. 48.5.

[77]Oct. 29, 1975, letter to Ruth Walden from John W. Poole, acting chief, Litigation Section, Antitrust Division, U.S. Department of Justice, written on behalf of Thomas E. Hauper, assistant attorney general in charge of the Antitrust Division, U.S. Department of Justice. (Hereafter, Poole letter.)

[78]Newspaper Preservation Act, 15 U.S.C. Sec. 1803(b).

[79]Report of the Assistant Attorney General in Charge of the Antitrust Division on the Anchorage, Alaska, Newspapers' Application for the Attorney General's Approval of a Joint Newspaper Operating Arrangement, Oct. 9, 1974. (Hereafter, Anchorage Report.)

[80]Ibid., pp. 19-21.

[81]Ibid., p. 10.

[82]Ibid., p. 10.

[83]Ibid., p. 21.

[84]Ibid., pp. 10 and 21.

[85]Editor and Publisher, Aug. 24, 1974, p. 22.

[86]Anchorage Report, pp. 19-21.

[87]Ibid., p. 22.

[88]Poole letter.

[89]America's Best Cinema Corporation v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. Ind. 1972); Newspaper Guild v. William B. Saxbe, Attorney General, 381 F. Supp. 48 (D.C.D.C. 1974); Bay Guardian Company v. Chronicle Publishing Company, 340 F. Supp. 76 (N.D. Calif. 1972) and 344 F. Supp. 1155 (N.D. Calif. 1972). The Bay Guardian Company case actually consisted of two cases. In the earlier of the two, 340 F. Supp. 76 (Feb. 24, 1972), the Guardian publishers had sought a declaratory judgment that the Newspaper Preservation Act was unconstitutional. Judge Carter, however, found that the action could not be maintained for technical jurisdictional reasons. In the later case, 344 F. Supp. 1155 (June 21, 1972), the defendants (Chronicle Publishing Co.) answered the Guardian's publishers' antitrust allegations by asserting the NPA as an affirmative defense. It was in the second case that Judge Carter ruled on the constitutionality of the act. In addition to the court cases, the Federal Communications Commission had cause to briefly consider the Newspaper Preservation Act in 1973 when the Chronicle Broadcasting Co. applied for a renewal of its licenses for stations KRON-FM and KRON-TV, In Re Application of Chronicle Broadcasting Co., San Francisco, Calif., for renewal of licenses of stations KRON-FM and KRON-TV, 40 FCC 2d 775 (1973), Docket No. 18500, File No. BRH-926, File No. BRCT-94. In that case, Albert Kihn and Blanche Streeter challenged the television and radio license renewals on the grounds that the joint operating arrangement between the San Francisco Chronicle and San Francisco Examiner was illegal in light of the Citizen case. The complaintants contended that the arrangement was an antitrust violation and "reflects adversely upon Chronicle's character to be a Commission licensee." (p. 788) The FCC found the joint agreement to be exempt under the provisions of the NPA and made no comment as to the definition of a failing newspaper. The FCC hearings examiner in that case noted that had the NPA not been passed "it might be necessary for this document to undertake a detailed analysis of the situation in San Francisco in light of the Court's explanation of the law governing Tucson." (p. 851, footnote 25)

[90]Newspaper Preservation Act, 15 U.S.C. Sec. 1803(c).

[91]NPA Regulations, Sec. 48.1.

[92]Bay Guardian Co. v. Chronicle Publishing Co., 344 F. Supp. 1155 (N.D. Calif. 1972), at 1157.

[93]Ibid., at 1157.